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In the

Supreme Court of the United States

October Term, 1977

No. 77-1301

Gannett Co., Inc.,

Petitioner,

v.

The Honorable Daniel A. DePasquale,
as Judge of the Seneca County Court,
et al.,

Respondents.

BRIEF OF THE AMERICAN CIVIL LIBERTIES UNION AND THE NEW YORK CIVIL LIBERTIES UNION AS AMICUS CURIAE IN SUPPORT OF THE PETITION FOR A WRIT OF CERTIORARI.

BRUCE J. ENNIS
JOEL M. GORA
American Civil Liberties Union
22 East 40th Street
New York, N.Y. 10016

DAVID RUDENSTINE
STEVEN R. SHAPIRO
New York Civil Liberties Union
84 Fifth Avenue
New York, N.Y. 10011

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INTEREST OF AMICI*

The American Civil Liberties Union is a nationwide, nonprofit, nonpartisan organization of approximately 250,000 members. The New York Civil Liberties Union is its statewide affiliate. Since their creation nearly sixty years ago, the ACLU and the NYCLU have been dedicated to the cause of personal liberty through a vigorous defense of the safeguards embodied within the Bill of Rights.

The present case raises issues of particular interest to the ACLU and NYCLU because it involves an apparent, although we believe misconceived clash between two fundamental civil liberties concerns. On the one hand, the ACLU and NYCLU have long asserted the paramount importance of a free press. Thus, in Nebraska Press Association v. Stuart, 427 U.S. 539 (1976), the ACLU participated as amicus curiae urging the invalidity of a prior restraint in the context of an ongoing criminal proceeding. Likewise, the NYCLU has actively litigated the question of public access to judicial hearings. Matter of Oliver v. Postel, 30 N.Y.2d 171, 331 N.Y.S.2d 407 (1972). On the other hand, the ACLU and NYCLU have long supported the right of every criminal defendant to a fair trial before an impartial tribunal. The ACLU therefore joined in Sheppard v. Maxwell, 384 U.S. 333 (1966), urging that the petitioner had been deprived of his Sixth Amendment right to a verdict untainted by prejudicial publicity. This historic commitment to both sides of the

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* Letters of consent from all parties to the filing of this brief are being filed with the Clerk of the Court.

"free press - fair trial" debate places amici in a unique position to aid the Court in balancing these critical constitutional values.

QUESTION PRESENTED

Did the Court of Appeals correctly hold that a trial judge in a criminal trial of considerable local interest could constitutionally exclude the public from a pretrial suppression hearing without a particularized showing of likely and substantial prejudice to the defendants, without a finding that other methods of preventing prejudice would have been ineffective, and with the burden on the excluded members of the press to show a "genuine public interest . . . outweigh[ing] the risks of premature disclosure"?

STATEMENT OF THE CASE AND POSITION OF AMICI

On July 19, 1976, Wayne Clapp, a former policeman in a small upstate New York community near Rochester, was reported missing by the local news media after his bullet-ridden boat was discovered adrift in Seneca Lake. An unsuccessful search to uncover his body was promptly begun. Three days later, two youths, ages 16 and 21, were arrested in Michigan and charged with the crime. At the time of the arrest, front page articles reported that each of the defendants had made

incriminating statements and that one of the defendants had led the police to the spot where he had buried Clapp's stolen revolver.

On November 4, 1976, a hearing was held on defendants' motion to suppress both their confession and the physical evidence discovered in Michigan. At the start of the hearing, defense counsel moved to exclude the public and the press, claiming only that evidentiary matters would be revealed "which may or may not be brought forth subsequently at trial." That request was orally granted by the trial judge without requiring the defendants to demonstrate the likelihood of prejudice if the hearing were open and without exploring the possibility that one of the procedural devices suggested in Sheppard v. Maxwell, 384 U.S. 333, 361-362 (1966), might be adequate to protect defendants' fair trial rights. On appeal, this lower court order was upheld by a divided New York Court of Appeals which ruled that whenever a criminal case has aroused some public interest, pretrial hearings should presumptively be closed at the defendant's request unless the members of the press or the public seeking access to the proceedings can show that "the magnitude of any genuine public interest . . . outweigh[s] the risks or premature disclosure." p. 9.

Amici respectfully suggest that this presumption in favor of closed judicial hearings is flatly inconsistent with our entire constitutional tradition. As this Court has observed on numerous occasions, the press and the public have a right to

observe the judicial process at work. The decision to close the doors of the courthouse is an extraordinary step which can only be justified if no other alternatives exist. In short, it is a last resort, not a first option. The failure of the Court of Appeals to appreciate that fact requires review by this court.

REASONS FOR GRANTING THE WRIT

I. This case presents an unresolved issue of great importance in the administration of criminal justice throughout the country involving the accommodation of conflicting interests of constitutional magnitude.

Two Terms ago, in Nebraska Press Association v. Stuart, 427 U.S. 539 (1976), this Court held that an extraordinary justification was required to sustain an order restraining the press from publishing information concerning a criminal proceeding. The Court expressly left open the question under what circumstances a trial court may constitutionally close criminal proceedings to the public in order to prevent the press and the public from obtaining information potentially prejudicial to a criminal defendant. Id. at 564 n. 8; cf. id. at 576 n. 3, 584 n. 11 (Brennan, J., concurring in judgment). This case presents precisely that question. Like the issue decided in Nebraska Press, it is a question of great significance both because of the magnitude of the constitional interests involved and because of its

practical importance in the day-to-day administration of criminal law.

A. The question presented involves the accommodation of significant constitutional interests.

This case presents a familiar conflict of values in a form not previously faced by this Court. On the one hand, the defendant's right to a fair trial before an unprejudiced jury, guaranteed by the Sixth Amendment and by the due process clauses of the Fifth and Fourteenth Amendments, can be compromised by excessive and inflammatory pretrial publicity. See e.g. Irwin v. Dowd, 366 U.S. 717 (1961); Rideau v. Louisiana, 373 U.S. 723 (1963); Estes v. Texas, 381 U.S. 532 (1965). On the other hand, the public has a right, inherent both in the First Amendment's guarantee of freedom of the press and the Sixth Amendment's command of public trials, to receive information concerning the operation of the criminal justice system.

In accommodating these rights, each of paramount importance, this Court has insisted time and again that the defendant's right to a fair trial must be assured by means that do not impermissibly impinge upon First Amendment values. Thus, this Court has repeatedly rejected use of the contempt power to punish those whose public statements arguably threaten the integrity of judicial proceedings. Wood v. Georgia, 370 U.S. 375 (1962); Craig v. Harney, 331 U.S. 367 (1947); Pennekamp v. Florida, 328 U.S. 331 (1946); Bridges v. California, 314 U.S. 252 (1941). And no

opinion of this Court has yet sustained a prior restraint intended to preclude discussion of the judicial process. Nebraska Press Association, supra; Oklahoma Publishing Co. v. District Court, 430 U.S. ___, 97 S.Ct. 430 (1977).

The present case is distinguishable from those earlier decisions only in that here the New York courts have not sought to prevent the press from printing information already in its possession, or from reporting what transpires in open court. Rather, they have sought to prevent the public and the press from acquiring information in the first instance, by closing the court. At first glance, such an action may appear as less of an affront to First Amendment interests than a direct "gag order" that in terms inhibits speech. In fact, such an order is far more sweeping, since it prevents any member of the public or press from observing the functioning of the judicial process, and thereby thwarts the public's right to information about the courts even more drastically and completely. Clearly, such orders frustrate "the function of the press . . . to guarantee the fairness of trials and to bring to bear the beneficial effects of public scrutiny upon the administration of justice." Cox Broadcasting Corp. v. Cohn, 420 U.S. 469, 491 (1975). As the dissenting judges below pointed out, quoting the staff report of a Senate subcommittee, a closed hearing represents "a serious backdoor threat to First Amendment interests." Dissent, p. 4. Moreover, by excluding members of the public generally, such orders conflict with the Sixth Amendment's command that trials

be public.

Without doubt, therefore, the propriety of the trial court's order in this case closing pretrial suppression hearings presents an important problem for resolution by this Court. And like other cases involving the "free press - fair trial" problem, this cases requires great sensitivity to the various constitutional interests at stake. We agree, however, with Mr. Justice Brennan, that "a choice [between First Amendment freedoms and the rights of a defendant to an impartial jury] is [not] necessary, that there is[no]inherent conflict that cannot be resolved without essentially abrogating one right or the other," Nebraska Press, supra, 427 U.S. at 611-612 (concurring opinion). The importance of reconciling those constitutional commands requires review by this Court

B. The question presented is one of increasing practical importance in the administration of criminal justice.

The significance of the constitutional issues involved in this case would alone, in our view, justify plenary review by this Court, even if the problem were one that arose infrequently. That is not, however, the situation here. On the contrary, the closing of court proceedings in criminal cases of great interest to the public is an increasingly common occurrence. Since this Court indicated in Nebraska Press that orders restraining the press from publishing information obtained in open court proceedings would rarely be consistent with the First Amendment, trial courts around the country

have with increasing frequency sought to achieve the same result by denying the press access to such information by holding judicial proceedings in secret. See Commercial Printing v. Lee, 2 Med.L.Rptr. 2352 (Ark.Sup.Ct. 1977); State ex rel. Dayton Newspapers, Inc. v. Phillips, 351 N.E.2d 127 (Ohio Sup.Ct. 1976); cf. United States v. Gurney, 3 Med.L.Rptr.1081 (5th Cir. 1977); Northwest Publications v. Anderson, 3 Med.L.Rptr. 1302 (Minn.Sup.Ct. 1977).

Given the constitutional command that judicial proceedings in criminal cases be conducted in public, closing the courts to the people must be regarded as an extraordinary remedy, to be reserved for extraordinary circumstances. The frequency with which the courts have recently resorted to this practice suggests that courts have been too quick to adopt a solution that may suit the convenience of the parties before them more than the requirements of the Constitution. The standard applied by the Court of Appeals in this case illustrates the failure of the lower courts to realize the radical nature of such orders. This case presents an opportunity for this Court to give guidance to the lower courts on the standards to be applied in deciding whether to invoke such a procedure.

II. The decision below, by permitting criminal proceedings to be closed without an adequate showing of necessity, unconstitutionally infringes the public's right to information about the criminal process.

The order approved by the New York Court of Appeals excluded the public from a pretrial suppression hearing in a murder case of grave public concern. It did so simply upon the request of the defendants, without any consideration of the adequacy of alternative means for insuring a fair trial. In the view of the Court of Appeals, the only limitation on the discretion of trial courts to enter such orders is the provision of an opportunity for "interested members of the news media . . . to be heard . . . in a preliminary proceeding adequate to determine the magnitude of any genuine public interest [that] may be found to outweigh the risks of premature disclosure." p. 9. We believe that the standard applied by the Court of Appeals gives far too little weight to the constitutional interest of the public in information regarding the criminal justice system.

A. The nature of the constitutional interest involved.

The right of the press and the public to information about the functioning of the criminal courts is a basic constitutional right, protected by the First and Sixth Amendments, and essential to the proper working of a democratic government. As this Court has frequently recognized: "A trial is a public event. What transpires in the courtroom is public property." Craig v. Harney, 331 U.S. at 374.

When a court seeks to close judicial proceedings to members of the press, it interferes with the right of the press "to

report whatever occurs in open court through their respective media," Estes v. Texas, supra, 381 U.S. at 541, every bit as effectively, and with every bit as much danger of suppressing "the beneficial effects of public scrutiny upon the administration of justice," Cox Broadcasting Corp. v. Cohn, supra, 420 U.S. at 491, as if it had sought to enjoin the press from printing information already in its possession.*

The First Amendment interest at stake in this case is therefore precisely the same as in Nebraska Press. "The commission of crime, prosecutions resulting from it, and judicial proceedings arising from the prosecutions, are without question events of legitimate concern to the public and consequently fall within the responsibility of the press to report the operations of government," Cox Broadcasting v. Cohn, supra, 420 U.S. at 491.

We recognize this Court's ruling in Branzburg v. Hayes, 408 U.S. 665, 684-685 (1972), "that the First Amendment does not guarantee the press a constitutional right of special access to information not available to the public generally." But it does not follow from Branzburg that the First Amendment interest involved in this case is so insignificant that it can be ignored. It is one thing to hold that the press can be excluded from grand jury proceedings. It is

* As the dissenting judges below observed, it is somewhat artificial to assume "that the right to observe an otherwise public proceeding is severable from and of less value than the right to convey information about it." Dissent, p.4.

quite another thing to say that First Amendment rights are not affected by governmental decisions to conduct business in secret.

At any rate, we do not advance a claim of special priviliege for members of the press to have access to places or events from which the general public is legitimately exluded. Rather, we maintain that the order of the New York court in this case infringed a right of the public in general to scrutinize the judicial process.* This right derives not only from the "First Amendment right to 'receive information and ideas,'" Kleindeinst v. Mandel, 408 U.S. 753, 762 (1967); see also, Red Lion Broadcasting Co. v. FCC, 395 U.S. 367, 390 (1965); Lamont v. Postmaster General, 381 U.S. 301 (1965); Thomas v. Collins, 323 U.S. 516 (1945), but also from the command of the Sixth Amendment that criminal trials be public.

The Sixth Amendment guarantee of a public trial in criminal cases is a fundamental principle of liberty. What this Court has called "[t]he traditional Anglo-American distrust for secret trials," In re Oliver,

* Of course, in most circumstances, it would be members of the press who would most actively seek enforcement of this right. As this Court has noted, "in a society in which each individual has but limited time and resources with which to observe at first hand the operation of his government, he relies necessarily upon the press to bring him in convenient form the facts of those operations." Cox Broadcasting Corp. v. Cohn, supra, 420 U.S. at 491.

333 U.S. 257, 268 (1948), is a long-standing aspect of our criminal justice system: its roots extend to the abolition of the Court of Star Chamber in 1641. Id. at 266. The importance of public scrutiny "as a safeguard against any attempt to employ our courts as instruments of persecution" has long been recognized. "The knowledge that every criminal trial is subject to contemporaneous review in the forum of public opinion is an effective restraint on possible abuse of judicial power." Id. at 270.

Of course, the right to a public trial is primarily a protection of the defendant. The text of the Sixth Amendment states that "the accused shall enjoy" that right, and insofar as the purpose of the guarantee is to prevent the use of the courts to persecute dissident minorities, the defendant can be counted upon to invoke the Amendment's protection. Nonetheless, the unanimous weight of authority, as the Court of Appeals recognized in this case, supports a broader view of the Amendment's command. See e.g. Matter of Oliver v. Postel, supra; United States v. Columbia Broadcasting System, 497 F.2d 102 (5th Cir. 1974).

Quite clearly, interests other than those of the defendant are protected by the requirement of public trials. These include: education of the public about the nature of the judicial process, In re Oliver, supra, 333 U.S. at 270 n. 24; preservation of public trust in the fairness of the courts, United States ex rel. Lloyd v. Vincent, 520 F.2d 1272, 1274 (2d Cir.), cert. denied, 423 U.S. 937 (1975); the possibility that witnesses might learn of the trial and come forward

to testify, In re Oliver, supra, 333 U.S. at 270 n. 24; and the right of the public to scrutinize the judicial process and to form its own conclusions about political issues affecting the judiciary.

Moreover, issues might arise in a trial, or in a pretrial suppression hearing, that would be of significant public interest but that the defendant, the prosecutor, and the court might each for their own purposes be content not to see revealed. In a case like this one, for example, the public has an important interest in observing the functioning of the exclusionary rule, both to evaluate the merits of proposals that the legislature alter the nature of that remedy, see Bivens v. Six Unknown Agents, 403 U.S. 388, 411 (1971)(Burger, C.J., dissenting), and to inform itself about possible government violations of constitutional norms. Yet the defendant's interest in preventing public knowledge of possible incriminating evidence, and the prosecutor's interest in suppressing knowledge of government misconduct, can prevent public awareness of these facts unless the public has an independent right to observe the criminal process.

We agree with the Court of Appeals that the need to protect a defendant's right to a fair trial before an impartial jury uncontaminated by prejudicial pretrial publicity is at least as important as the other interests that have been held to justify exclusion of the public from the criminal proceedings in appropriate circumstances. See e.g. United States ex rel. Smallwood

v. LaValle, 377 F.Supp. 1148 (E.D.N.Y.), aff'd, 508 F.2d 837 (2d Cir. 1974), cert. denied, 421 U.S. 920 (1975)(trial closed to protect the safety of witnesses); United States v. Clark, 498 F.2d 535 (2d Cir. 1974) (hearing closed to maintain the integrity of government precautions to forestall hijackings). The New York courts in this case, however, applied an impermissibly lenient standard, permitting the vital constitutional rights of the press and public under the First and Sixth Amendments to be infringed when no real threat to the defendants' right to a fair trial existed that could not be dealt with by means not involving constitutionally protected interests.

B. The Court of Appeals failed to give adequate recognition to the public's rights, and to the existence of less restrictive alternatives.

Given the nature of the public's constitutional right to observe the operation of the criminal courts, the exclusion of the public from criminal proceedings is not a step to be taken lightly. Before a court undertakes to exclude the public because of the possible prejudicial impact of material that may be the subject of suppression hearings, it must assure itself that an actual danger of such prejudice exists, and that it cannot be averted by less drastic means. Cf. Nebraska Press, supra. The New York courts completely failed to do so in this case, and the opinion of the Court of Appeals, by setting a standard that encourages trial courts to close suppression

hearings almost as a matter of course, assures that they will continue to do so in the future.

The trial judge in this case initially closed the suppression hearing to the public simply at the request of the defendants, finding only that "certain evidentiary matters may come up in the testimony of the People's witnesses that may be prejudicial to the defendants." When petitioner appeared by counsel and moved the court to vacate the order, the judge found "a reasonable probability of prejudice to the defendants" and stood by his earlier order. No specific findings were made concerning the extent of the likely publicity for whatever information was expected to be revealed, the likelihood that such publicity would reach and prejudice potential jurors, or, most significantly, the possibility that the devices suggested by this Court in Sheppard v. Maxwell, supra, would adequately protect the defendants' interests.*

The opinion of the Court of Appeals is even more cavalier in its disregard of the public's right to information about the operation of the courts. Strongly implying that the trial court has an obligation not "to allow public disclosure of potentially tainted evidence," p. 8, that court held that

* The Court of Appeals' comment that the county court had "determin[ed] that open suppression hearings, if exposed to notoriety, would have deprived [the defendants] of any meaningful opportunity to receive a fair trial" represents, even in its conditional form, a considerable overstatement of the trial court's actual findings.

"where press commentary on pretrial suppression hearings would threaten the impaneling of a constitutionally impartial jury in the county of venue, pretrial evidentiary hearings in this State are presumptively to be closed to the public." p. 9. This presumption may be overcome only if "the magnitude of any genuine public interest [is] found to outweigh the risks of premature disclosure." Id.

The Court of Appeals opinion completely reverses the appropriate presumptions. The standards it announces are fatally defective in a least two ways. First, the court entirely fails to allow for the possibility that alternate means for protecting the defendant's rights might be found. In particular, the court appears to rule out the possibility of a change of venue. Yet the facts of this very case demonstrate the possibility that a change of venue can accommodate the public's right to know and the defendant's right to a fair trial. Indeed, the case would appear a classic one for a change of venue: because of the local fame of the victim, the case was rather notorious in the immediate vicinity but caused hardly a ripple of interest in other parts of the State.* Even in Sheppard v. Maxwell, supra, where this Court was faced with a barrage of pretrial publicity far in excess of anything shown here, Justice Clark observed:

* As far as amici have been able to determine, neither Mr. Clapp's disappearance nor defendants' subsequent arrest were even reported in the New York Times. A change of venue to New York City would, therefore, have clearly protected defendants' fair trial rights.

> "Of course, there is nothing that proscribes the press from reporting events that transpire in the courtroom. But where there is a reasonable likelihood that prejudicial news will prevent a fair trial, the judge should continue the case until the threat abates, or transfer it to another county not so permeated with publicity." Id. at 363-364.

Second, by insisting that pretrial hearings be opened only upon a showing of extraordinary interest in a particular case, the Court of Appeals ignores the fact that the public has an interest of consitutional dimension in the functioning of the judicial process in each and every case.

As we have pointed out, we do not seek a rule that pretrial suppression hearings always be opened to public scrutiny, regardless of the interest of the state or the defendant. Indeed, we agree with this Court's dictum in Branzburg v. Hayes, supra, that the defendant's interest in a fair trial uncontaminated by prejudicial publicity may be significant enough in particularly appropriate circumstances, to outweigh the public's constitutional right to information about the judicial process and to require the closing of such hearings. Nevertheless, the right of the public is not to be disregarded. The actions of the New York courts in this case demonstrate the need for this Court to set appropriate standards for determining the existence of the necessary circumstances.

The standards that best protect the public's right without endangering the defendant's rights are analogous to this this Court announced in Nebraska Press.

First of all, we believe it is essential to emphasize, as the Court of Appeals did not, that the right of the public to access to the courts is of constitutional dimension, and not to be interfered with lightly. Therefore, in the ordinary case, it is to be presumed that all significant aspects of a criminal trial shall be conducted in the open.

Second, in order to depart from this ordinary practice, the trial court must find a significant likelihood that, because of the notoriety of the case and the prejudicial nature of the evidence likely to be offered at a suppression hearing, an open hearing could impinge upon the defendant's right to a fair trial. It should be noted that the wide dissemination of even highly prejudicial material will not always interfere with a defendant's rights. See e.g. Murphy v. Florida, 421 U.S. 794 (1975).

Third, and it is here that the standards set by the Court of Appeals are most deficient, the court must inquire "whether measures short of an order [closing the hearing to the public] would have insured the defendant a fair trial." Nebraska Press, supra, 427 U.S. at 563. In this case, for example, it seems clear that a change of venue would have been sufficient to preserve the defendants' rights. In other cases, a continuance to allow the case to fade from public memory, or a careful voir dire at the time of jury selection, have proved

equally effective.* See Nebraska Press, supra, 427 U.S. at 563-564; Sheppard v. Maxwell, supra, 384 U.S. at 357-362; United States v. Silverthorne, 400 F.2d 627, 635-640 (9th Cir. 1968).

Finally, the court must consider whether or not an order closing the pretrial hearing would effectively prevent impairment of the defendant's rights. Cf. Nebraska Press, supra, 427 U.S. at 565-567. If, for example, the substance of the evidence to be introduced at the suppression hearing has already been made public, little purpose would be served by shielding the judicial response to that evidence from public scrutiny. Again, it would appear from the record in this case, that by the time of the suppression hearing the press had already reported defendants' confession and the fact that the police had been led to the victim's missing gun.

The failure of the Court of Appeals to adhere to the standards announced in Nebraska Press is a serious matter which this Court cannot ignore and should not condone. Under the proposed rule of the Court of Appeals, pretrial hearings in virtually any criminal case that attracts widespread publicity can be closed to the public, and the primary avenue through which the public can observe the costs and benefits of the exclusionary

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* The availability of these alternate remedies negates any argument that closure is necessary to effectuate the purposes of the exclusionary rule. Incompetent and prejudicial evidence can be kept from the jury without any sacrifice of First Amendment rights through the simple device of a change of venue in those few cases where pretrial publicity is a serious problem.

rule, and learn of the conduct of their public officials that often requires the exclusion of evidence, will be needlessly lost.* As we stated at the outset, pretrial proceedings should only be closed as a last resort in that rare criminal case where the defendant's right to a fair trial is genuinely and demonstrably threatened, and cannot be otherwise assured. If this simple rule is followed, then the rights of the defendant as well as those of the public will be fully guaranteed.

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* It is not a sufficient answer that suppression hearings in cases in which the public is not interested will remain open, or that under the Court of Appeals' opinion transcripts of the hearings will be available even in notorious cases after the trial is over. The beneficial effects of public scrutiny cannot be obtained if such scrutiny is allowed only in cases, or at times, in which a lack of interest indicates that little scrutiny will occur. This Court has in the past been particularly careful in reviewing restraints on the public's right to receive information that "produce their restrictive results at the precise time when public interest in the matter discussed would naturally be at its height." Bridges v. California, supra, 314 U.S. at 268.

CONCLUSION

For the reasons stated above, certiorari should be granted.

Respectfully submitted,

BRUCE J. ENNIS
JOEL GORA

American Civil Liberties Union
22 E. 40th Street
New York, New York

DAVID RUDENSTINE
STEVEN R. SHAPIRO

New York Civil Liberties Union
84 Fifth Avenue
New York, New York